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19 Excelsior Medical Corporation

20 **UNITED STATES DISTRICT COURT**
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 **IVERA MEDICAL CORPORATION,**

23 Plaintiff,

24 v.

25 **EXCELSIOR MEDICAL**
26 **CORPORATION,**

27 Defendant.
28

Case Nos. 11-cv-01115-H (RBB)
12-cv-01581-H (RBB)
(consolidated)

**NOTICE OF EXCELSIOR
MEDICAL CORPORATION'S
POSITION ON JOINT MOTION
FILED IN RELATED CASE**

PLEASE TAKE NOTICE THAT on June 17, 2013, the parties to *Ivera Medical Corporation v. Hospira, Inc.*, Case Nos. 11-cv-01246-H (RBB), 12-cv-01582-H (RBB) (consolidated), Ivera Medical Corporation (“Ivera”) and Hospira Inc. (“Hospira”), filed a joint motion for clarification or reconsideration with the Court regarding the Court’s June 5, 2013 Order Granting in Part and Denying in Part Hospira’s Motion to Modify the Claim Construction Schedule (the “Order”). (See Case No. 11-cv-01246-H-RBB, D.E. 75 at 2.)¹ In their motion, Hospira and Ivera explain why they do not believe that they should submit briefs addressing the construction of claim terms under the existing briefing schedule enumerated in the Order. (See *id.* at 2-4.) Since the Order applies to this action as well (see D.E. 42), Excelsior Medical Corporation (“Excelsior”) submits this notice to provide the Court with its position.

The Court’s Order found good cause to modify the claim construction schedule “with respect to the claims rejected by the PTO,” but instructed that briefing would still go forward on those “claims that the PTO did not reject.” (D.E. 42). However, as noted in Ivera and Hospira’s joint motion, the only claims that were not rejected in the *inter partes* reexamination proceedings were *unasserted* claims; all of the *asserted* claims stand rejected. Since all of the asserted claims stand rejected, Excelsior maintains that claim construction briefing should be suspended per the Order, and that no party should brief terms of unasserted claims. Nevertheless, given certain language in the Order, like Ivera and Hospira, Excelsior also would benefit from clarification from the Court that no claim construction briefing need be submitted at this time.

¹ The motion inadvertently refers to Case Nos. 11-cv-01246-H (RBB) and 11-cv-01582-H (RBB). Nonetheless, it is apparent that the motion relates to Case Nos. 11-cv-01246-H (RBB) and 12-cv-01582-H (RBB), which are pending patent infringement actions concerning Ivera Medical Corporation and Hospira, Inc.

1 In the event that the Court is not inclined to provide this clarification,
2 Excelsior respectfully requests that the Court hold an emergency conference call at
3 its earliest convenience so that the parties may be fully heard on these matters in
4 advance of the June 21, 2013 deadline in the existing claim construction briefing
5 schedule.

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7 Respectfully submitted,

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9 DATED: June 18, 2013

10 SHEPPARD MULLIN RICHTER & HAMPTON LLP

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12 By s/ Michael Murphy

13 MICHAEL MURPHY

14 Attorneys for Defendant/Counterclaim Plaintiff
15 EXCELSIOR MEDICAL CORPORATION
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronically filing the same with the Court's CM/ECF system, which caused a Notice of Electronic Filing to be emailed to the following:

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This the 18th day of June, 2013.

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By s/ Michael Murphy
MICHAEL MURPHY

Attorneys for Defendant/Counterclaim Plaintiff
EXCELSIOR MEDICAL CORPORATION

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